

Paris Congress

ALAI 2023

Artificial intelligence, copyright and related rights

June 22-23, 2023

To National Reporters:

*The questionnaire uses the neutral term AI "production" to refer to content generated by an artificial intelligence system. As opposed to the term "work (of the mind)" which is the one that describes the classical object of copyright protection. This means that the content we are interested in is content produced by the artificial intelligence machine (or "system"), itself fed upstream by works of the mind, reproduced in a training data base. The margin of intervention of the final user is thus a priori very limited, but not always non-existent. The hypothesis concerned by this Congress is thus closer to what the ALAI once studied as "computer-generated creations" than to "computer-assisted creations" (see the 1989 Quebec City Congress).*

*In the mind of the editors of this questionnaire, an "artificial intelligence system" is defined as a computer system that allows, with a certain autonomy, automated decision making or predictions influencing real or virtual environments<sup>1</sup>.*

*The questions raised are numerous because of the disruptive nature of the phenomenon, the multitude of issues and the theoretical, economic and social importance of the stakes.*

*Some of the questions will undoubtedly be accompanied by brief negative answers, which is already a useful answer for the General Reporters. Simply indicate these ("no", "none").*

*In other cases, the answers may be uncertain. In these cases, it is easiest to follow the classic pattern: "1) What do statutes and regulations say? 2) What does the caselaw say? 3) What does the national group think? To questions 1 and 2 above, the answer will often be "Nothing specific about AI but the relevant reference text/principle might be ...". Regarding 3), the national group is not obliged to have taken a position.*

*It is of this uncertainty and diversity that we will try to draw together, in June, a clear picture.*

*The team of the Scientific Committee (Alexandra Bensamoun, Jane Ginsburg, Silke von Lewinski, Pierre Sirinelli) is of course at your disposal to explain a question that might not seem, because of the particular context, immediately clear.*

*Thank you all and we look forward to seeing you in Paris.*

*Note: the questionnaires must be returned by the national groups no later than May 8, 2023. They will be sent to Pierre Sirinelli ([pierre.sirinelli@univ-paris1.fr](mailto:pierre.sirinelli@univ-paris1.fr)) and Sarah Dormont ([sarah.dormont@u-pec.fr](mailto:sarah.dormont@u-pec.fr)).*

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<sup>1</sup> This definition is comparable to the one retained by the European Union in the discussion on the AI Act (proposed regulation COM(2021) 206 final, March 2023 position), itself inspired by the 2019 OECD Recommendation on AI.

## Responses for Germany\*

### 1. *Understanding*

#### 1.1 Has your national or regional law adopted a legal definition of AI?

There is currently no legal definition of AI in German law. However, Article 3 (1) of the proposed (EU) AI-Act defines AI as software that can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.<sup>2</sup> This definition will be applicable in Germany once it comes into effect.

#### 1.2 - Can you provide some examples of current uses of AI and its productions in the cultural sector of your country?

Newspapers and other news companies have implemented '**robo-journalism**'. They use AI-systems to create articles that analyze data in topics like sports or election coverage. For example, the Newspaper 'SZ' used this kind of technology in their coverage of the Bavarian state election.<sup>3</sup> While the AI analyzed the election results, human journalists could focus on commentaries and in-depth analysis of the election. In **investigative journalism** AI can be used to help the journalists to sift through immense amounts of data. The newspaper SZ operates a 'division for data-journalism' for these kinds of projects, one example being the 'Panama Papers' – An Investigative research project about tax evasion.<sup>4</sup>

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\* Questions 1.1-2.4. were answered by Konstantin Isele, questions 2.5 and 4.11 by Dr. Armelle Grandjean, Legal Counsel, GEMA; questions 3-7 (except 4.11) were answered by Anna Sophie Ostermeier.

<sup>2</sup> Art. 3 (1), COM (2021) 206 final, Proposal for the Artificial Intelligence Act, March 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0206>.

<sup>3</sup> Kreye, Andrian, *Die rote Linie*, Süddeutsche Zeitung, 15.02.2021, <https://www.sueddeutsche.de/medien/kuenstliche-intelligenz-fake-news-recherche-1.5204699>.

<sup>4</sup> Kreye, Andrian, *Die rote Linie*, Süddeutsche Zeitung, 15.02.2021, <https://www.sueddeutsche.de/medien/kuenstliche-intelligenz-fake-news-recherche-1.5204699>.

DeepL SE, the German company, which is mainly known for the AI translator DeepL, now offers the service **DeepL Write**. This service aims at not only correcting grammar and spelling mistakes, but also at improving the general style of the user's texts by the means of AI.<sup>5</sup>

Publishers of fiction books can use the AI-software **LiSA** from **QualiFiction** to evaluate manuscripts from potential authors.<sup>6</sup> The system can also be used to analyze the potential of a book by looking at linguistic patterns, length, popularity of a topic, etc. and then comparing it to genre 'best-sellers'.

Some painters, sculptors, etc. in Germany resort to the support of **AI-assistants** when creating their art. The Polish artist **Roman Lipski**, who lives in Berlin, for example, uses AI to analyze his paintings, break them down to their components and recombine them.<sup>7</sup>

The company **Intelligent Art Solutions** offers another kind of '**Assistant-AI**', which supports the artist by creating ideas and concepts for possible artworks based on given parameters and data.<sup>8</sup>

There are many more individual artists or collectives, who use AI to create art. One example being the **Lunar ring collective**, a group of artists who want to approach AI from an artistic perspective and whose art is created by using generative AI systems as well as neural renderings or autoregressive language models.<sup>9</sup>

Recently the artist and photographer **Boris Eldagsen** won in the creative open category at the Sony world **photography** awards with the artwork 'Pseudomnesia'.<sup>10</sup> However, he declined the award, admitting that he used AI when he created the art and that his intention was to start a debate about the use of AI in the world of photography.

**Holly Herndon**, an American musician and composer living in Berlin, used the AI 'Spawn', which recorded voice sample it generated from training-data of Herndon voice and the voices of a small ensemble, in the production of the album Proto in 2019.<sup>11</sup> Since then she and her partner released other AI-systems capable of producing music and co-founded **Spawning**, a start-up, whose services

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<sup>5</sup> DeepL, *Say it right with DeepL Write: Introducing our new AI writing companion*, 17.01.2023, <https://www.deepl.com/en/blog/introducing-deepl-write>.

<sup>6</sup> Berins, Lisa, *Chatbots in der Literatur: Und die KI schreibt mit*, Frankfurter Rundschau, 09.04.2023, <https://www.fr.de/kultur/gesellschaft/chatbots-in-der-literatur-und-die-ki-schreibt-mit-92192465.html>.

<sup>7</sup> Willenbrock, Harald, *When Is Art Really Art*, Goethe Institut – Zeitgeister, Jan. 2021, <https://www.goethe.de/prj/zei/en/pdk/22094490.html>.

<sup>8</sup> Intelligent Art Solutions, *The Artificial Idea Generation*, <https://www.intelligentartsolutions.com/services.html>.

<sup>9</sup> Lunar Ring, *About us*, <https://www.lunar-ring.ai>.

<sup>10</sup> Grierson, Jamie, *Photographer admits prize-winning image was AI-generated*, The Guardian, 17.04.2023, <https://www.theguardian.com/technology/2023/apr/17/photographer-admits-prize-winning-image-was-ai-generated>.

<sup>11</sup> Willenbrock, Harald, *When Is Art Really Art*, Goethe Institut – Zeitgeister, Jan. 2021, <https://www.goethe.de/prj/zei/en/pdk/22094490.html>.

help artists identifying whether their work has been used in AI training data-sets and regulating such usage.<sup>12</sup>

For the 250<sup>th</sup> anniversary of Ludwig van Beethoven's birthday, the Deutsche Telekom assembled an expert team in order to complete **Beethoven's uncompleted 10<sup>th</sup> symphony** with the help of AI.<sup>13</sup> The AI was fed with Beethoven's sketches and notes and scores of contemporary artists and produced potential versions of symphony, which then was sorted and put together by the expert team. However, it is somewhat disputed, whether this human-AI-coworking musical experiment succeeded in recreating the true style of Beethoven.<sup>14</sup>

**1.3 - (Optional) What are the issues that have been exposed in your country on this subject: stakes, difficulties, orientations, proposals...?**

**1.4 - Are there any initiatives in your country or region aimed at regulating the use of AI in the cultural sectors?**

There are several initiatives in the cultural sector, who demand a stricter regulation of AI. However, they are not initiatives by the legislature.

One of those is the '**Initiative Urheberrecht**'- the 'Authors' Rights Initiative'. It consists of over 40 associations and trade unions representing over 140.000 authors and artists in the industries of photography, journalism, books, music, film and TV, illustration, fine arts, etc..<sup>15</sup> They are concerned about the impact that generative AI-systems will have on the individual and society itself and warn that the proposed AI-Act will disregard the rights of the creative and allow the use of generative AI-systems without ensuring proper protection against the misuse of those systems. Therefore, they demand that the European legislators add the following amendments to the proposed AI-Act:

"Generative AI must be regulated across the entire product cycle, with particular focus on providers of foundation models (large language models and other large foundation models). The placing of such foundation models on European markets should be conditioned on providers demonstrating that they fulfil minimum requirements" regarding in particular transparency on training materials, liability of AI-

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<sup>12</sup>Stokel-Walker, Chris, *This couple is launching an organization to protect artists in the Ai era*, INPUT, 14.09.2022, <https://www.inverse.com/input/culture/mat-dryhurst-holly-herndon-artists-ai-spawning-source-dall-e-midjourney> ; Spawning, *FAQ*, <https://spawning.ai/FAQ-1>

<sup>13</sup>Oelze, Sabine, *Beethovens "Unvollendete" von KI vollendet*, DW, 09.10.2021, <https://www.dw.com/de/beethoven-10-sinfonie-unvollendete-ki-k%C3%BCnstliche-intelligenz/a-59378632>.

<sup>14</sup>Hübner, Henning, *Künstlich ist nicht künstlerisch*, BR-Klassik, 10.10.2021, <https://www.br-klassik.de/aktuell/news-kritik/kritik-urauffuehrung-beethoven-10-symphonie-kuenstliche-intelligenz-computer-bonn-100.html>.

<sup>15</sup> Initiative Urheberrecht, *About Us*, <https://urheber.info/about-us>.

systems, avoidance of algorithms that would promote AI-generated content over works created by humans, structural separation of AI generation and dissemination of content and a minimum degree of European infrastructure.<sup>16</sup> Additionally they demand that “it should be clarified that the text and data mining exceptions laid down in Articles 3 and 4 of the DSM Directive (EU 2019/790) never allowed generative AI systems to substitute its sources without any compensation.”<sup>17</sup>

The Initiative ‘**KI aber fair**’ – ‘AI but fair’ – consists of several unions and interest groups in the creative industry. They demand protection and compensation for the works of creatives, transparency regarding the data used for AI-training, special protection, appreciation and promotion for creatives and artists and compulsory labeling for AI-generated content.<sup>18</sup>

## 2. **Understanding the upstream**

**2.1** - Are the AI system or its components likely to be protected by intellectual property rights (copyright and/or industrial property – patents, trade secrets . . .)?

The software of an AI-system is principally protected by copyright under **§ 69a I, II UrhG**.<sup>19</sup>

The training data-sets an AI-system needs could **potentially** be protected by copyright as a database work/ ‘Datenbankwerk’ according to **§§ 2, 4 II UrhG**, if the requirements regarding the intellectual creation of the selection or arrangement of their contents are met.<sup>20</sup> However, general requirements regarding the personal intellectual creation are still applicable to database works.<sup>21</sup> Most of the AI training data sets are likely not to be able to fulfill these requirements.

Nevertheless, the database can be protected by the ancillary right provided by **§ 87a I, II UrhG**, implementing the EU’s sui generis right, if the obtaining, verification and presentation of the contents of the database require a qualitatively and/or quantitatively substantial investment.<sup>22</sup>

The protection of AI systems in patent law is a highly controversial and complex topic.<sup>23</sup> **§ 1 III, IV PatG and Art. 52 (2) (c) European Patent Convention** exclude computer programs ‘as such’ from patent

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<sup>16</sup> Initiative Urheberrecht, *Authors and Performers Call for Safeguards Around Generative AI in the European AI Act, Executive Summary*, 19.04.2023, [https://urheber.info/media/pages/diskurs/ruf-nach-schutz-vor-generativer-ki/cd90dadf7e-1682002178/authors-and-performers-call-for-safeguards-around-generative-ai\\_20.4.2023.pdf](https://urheber.info/media/pages/diskurs/ruf-nach-schutz-vor-generativer-ki/cd90dadf7e-1682002178/authors-and-performers-call-for-safeguards-around-generative-ai_20.4.2023.pdf).

<sup>17</sup> Initiative Urheberrecht, *Authors and Performers Call for Safeguards Around Generative AI in the European AI Act, Executive Summary*, 19.04.2023, [https://urheber.info/media/pages/diskurs/ruf-nach-schutz-vor-generativer-ki/cd90dadf7e-1682002178/authors-and-performers-call-for-safeguards-around-generative-ai\\_20.4.2023.pdf](https://urheber.info/media/pages/diskurs/ruf-nach-schutz-vor-generativer-ki/cd90dadf7e-1682002178/authors-and-performers-call-for-safeguards-around-generative-ai_20.4.2023.pdf)

<sup>18</sup> KI aber fair, *Positionspapier der Kreativwirtschaft zum Einsatz von KI*, 04.04.2023, <https://ki-aber-fair.de/file/a/715208db80892482.pdf>.

<sup>19</sup> Hetmank/Lauber-Rönsberg, *Künstliche Intelligenz – Herausforderungen für das Immaterialgüterrecht*, GRUR 2018, 574 (575).

<sup>20</sup> Appel/Kaulartz, *Rechtlicher Schutz von Machine Learning-Modellen*, RDi. 2020, 24, Rn. 20.

<sup>21</sup> Dreier, *Dreier/Schulze UrhG*, § 4, Rn. 19.

<sup>22</sup> Appel/Kaulartz, *Rechtlicher Schutz von Machine Learning-Modellen*, RDi. 2020, 24, Rn. 20.

<sup>23</sup> Wiebe, *Leupold/Wiebe/Glossner IT Recht*, Teil 9.6.1, Rn. 1.

protection. AI systems solely based on “mathematical-abstract calculation-models” do not have a technical character and are therefore not patentable.<sup>24</sup> However, AI systems can still be patentable, if the invention is not solely abstract, it is executed by a computer or similar devices with a technical effect and it has some kind of technical character.<sup>25</sup>

For a more detailed explanation of the patentability of AI-systems please visit this article on Artificial Intelligence on the EPO-website:

<https://www.epo.org/news-events/in-focus/ict/artificial-intelligence.html>

Furthermore, AI-systems could be protected by trade secret law. In order to be protected, the AI-system has to qualify as a trade secret according to § 2 I GeschGehG.<sup>26</sup>

## 2.2 - Can rights under copyright be enforced against the use of protected contents by AI training?

Does the insertion of a pre-existing work into the computer system implicate rights under copyright?

The insertion of a pre-existing protected work into a computer system constitutes an act of reproduction and is covered by the right of reproduction according to § 16 UrhG. Reproduction is the copying of a work in a way that allows humans to directly or indirectly perceive the work.<sup>27</sup> The UrhG includes any method of reproduction: Downloading a work from the internet, saving a work on a computer’s hard drive, etc., constitutes a reproduction.<sup>28</sup>

If so, in order to avoid a finding of infringement, are the copying or storage covered by an exception?

However, the copying of works could be covered by the text and data mining exception in § 44b UrhG, the German implementation of Art. 4 of the EU’s DSM-Directive. Text and Data Mining (TDM) means any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.<sup>29</sup>

§ 44b II UrhG permits the reproduction of lawfully accessible works for the purposes of text and data mining but states that the copies must be deleted when no longer needed for the TDM. Right holders can reserve the use of their works; however, this opt-out has to be in a machine-readable format for works that are available online.<sup>30</sup> § 44b UrhG only allows the reproduction of works in order to carry out text and data mining.<sup>31</sup> Furthermore, § 44b UrhG does not permit the communication to the public (§ 19a UrhG) of the used works.<sup>32</sup>

## 2.3 - In your country, are there any proposals to change the law and in which direction?

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<sup>24</sup> Wiebe, *Leupold/Wiebe/Glossner IT Recht*, Teil 9.6.1, Rn. 4.

<sup>25</sup> Ménière/Pihlajamaa, *Künstliche Intelligenz in der Praxis des EPA*, GRUR 2019, 332 (334).

<sup>26</sup> Appel/Kaulartz, *Rechtlicher Schutz von Machine Learning-Modellen*, RD. 2020, 24, Rn. 34.

<sup>27</sup> Schulze, *Dreier/Schulze UrhG*, § 16 Rn. 6.

<sup>28</sup> Schulze, *Dreier/Schulze UrhG*, § 16 Rn. 7.

<sup>29</sup> Legal definition : § 44b I UrhG, Art. 2 (2) DSM-Directive 2019/790.

<sup>30</sup> § 44b III UrhG ; Bullinger, *Wandtke/Bullinger UrhG*, § 44b, Rn. 10.

<sup>31</sup> Dreier, *Dreier/Schulze UrhG*, § 44b Rn. 11.

<sup>32</sup> Dreier, *Dreier/Schulze UrhG*, § 44b Rn. 12.

For example, by deeming that the incorporation of preexisting works into AI systems does not create an actionable "reproduction" of the works? Or by creating a new exception? Or by implementing a compulsory licensing system? Other solutions?

No, there are no legislative proposals to change the law. However, there is an academic discussion on this topic.

**2.4** - Do the "terms of service" of the platforms available in your country authorize the copying and storage for the purpose of constituting "training data" and the creation of "AI outputs" of the works posted by the users of the platform? If so, give examples of the relevant Terms of Service.

The terms of use/service of most platforms demand that users grant the platforms non-exclusive rights regarding the use of all of their content protected by IP-rights.

Some platforms go into more details on how the users' content will be used.

Google's terms of use state: "This license is for the limited purpose of operating the service [...] This includes using automated systems and algorithms to analyze your content [...] to recognize patterns in data [...]"<sup>33</sup>

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<sup>33</sup> Google Nutzungsbedingungen (Google ToS), Paragraph : Erlaubnis zur Nutzung Ihrer Inhalte (Permission to use your content) <https://policies.google.com/terms?hl=de&fg=1#toc-permission>.

**2.5** - Are you aware of the conclusion of individual or collective licenses on this point? If yes, in which fields of creation? Under what conditions? If so, give examples.

We are not aware of the conclusion of any individual or collective licenses with regard to the use of pre-existing works for AI training so far. But GEMA has been assigned by its members their right of reservation against reproductions in the context of text and data mining activities. GEMA is therefore in the process of taking various measures to declare this right of reservation collectively for its repertoire. In this regard, GEMA is also in contact with its international partners, e.g. via ICE, to bundle reservations for a wider repertoire. With these measures, it is intended to establish the conditions for a future conclusion of collective licenses in the field of AI created music. Potentially, also ECL (extended collective licensing) may be a relevant instrument in this domain.

### **3.      *Using AI as a tool for rights management and administration***

**3.1** - To what extent is AI used to locate or identify protected content, to moderate it, or even to fight against infringement?

**3.2** - If computer tools are used for this identification, are there rules to allow the evaluation of the tools used in order to verify the relevance of the results produced by the AI system? (For example, in the framework of the European Digital Services Act, platforms have an obligation of transparency, notably on the tools used and the results they produce - art. 15).

If the answer is yes, are these rules derived from practice (usages, contracts, softlaw...) or imposed by legislation or regulation, or by case law?

**3.3** - To what extent is AI used as a tool to recommend protected content? For example, the proposal of "playlists" by Pandora or any other online communication service making recommendations of works.

AI has been used to recommend protected content through algorithms for years. It is also used by suppliers for personalising offers and advertisements due to the consumer's previous preferences.

**3.4** - Should we fear, through this recommendation, a risk of dilution of contents and revenues due to a possible opacity of the system?

The recommendations are based on the individual previous actions of the user. Consequently, the shown content is personally cut out for the user in question. As a result, a possible opacity of the system is more likely to be solely a subordinate influence. However, that doesn't change the fact that the risk of dilution of contents and revenues due to a lack of transparency still exists.

**3.5** - Does your national or regional law contain transparency obligations on the use of an AI system for rights management in your national or regional law (e.g. the European Digital Services Act)? What are they?

Apart from the European Digital Services Act, there are no further transparency obligations yet.



**3.6** - In general, do these tools have to comply with rules in terms of product safety or conformity?  
Are there procedures for certification of these tools by an authority or by professional associations?  
Are suppliers subject to specific due diligence obligations?

***Artificial intelligence and literary and artistic property***

***The contours of protection***

***The status of AI Outputs***

**1. Access to protection**

**- Characterization of the AI output as a “Work” of authorship**

*Note: If an AI output has all the external aspects of a work of authorship, is it possible to consider it as a work of authorship protected by copyright?*

**4.1** - Does a “Work” always imply the presence of a physical person?

Yes, the presence of a physical person is always required. It is implied by using the term “persönlich” (= “personal”) in § 2 (2) of the German Copyright Act which refers to physical persons only.<sup>34</sup>

**4.2** - From what threshold is it possible to consider that there is a human intervention giving rise to an original work in the realization of an AI output? What types of intervention would allow to know if this threshold has been crossed?

In Germany, copyright protection is also possible if the work was made by assistance of machines or computer programmes (so-called “computer aided works”), as long as the mentioned technical devices were solely used as a tool. Therefore, it is necessary that the outcome of a technical process can be planned and set unambiguously, by giving precise instructions to the technical device.<sup>35</sup> The threshold is high, and the protection depends on the individual circumstances of different cases. It can be stated that if the essence of a production can, as a result of giving precise instructions, be linked to a natural person, copyright protection will be likely to apply.<sup>36</sup> Nevertheless, as for machine learning algorithms, those outputs tend to fail copyright protection as a consequence of their high level of autonomy.

**4.3** - How can we distinguish between AI-assisted outputs and outputs generated by an AI?

AI-assisted outputs are characterized by the fact that the essence of the creating process and the outcome are still predominated by the clear instructions the human has given to the AI; however, such cases where AI is simply a tool for a human to achieve the concrete envisaged expression does

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<sup>34</sup> Schricker/Loewenheim/Loewenheim/Leistner, UrhG, § 2 no. 38 ff. ; S. v. Lewinski ‘L’intelligence artificielle et le droit d’auteur’, Mélanges en l’honneur de Pierre Sirinelli ‘Entre art et technique : les dynamiques du droit, p. 148.

<sup>35</sup> See Schricker/Loewenheim/Loewenheim/Leistner, UrhG, § 2 no. 39 f.

<sup>36</sup> See Schricker/Loewenheim/Loewenheim/Leistner, UrhG, § 2 no. 40 f.; see also S. v. Lewinski ‘L’intelligence artificielle et le droit d’auteur’ in Mélanges en l’honneur de Pierre Sirinelli ‘Entre art et technique : les dynamiques du droit, p. 149 f.

not seem to exist as of now (see 4.2 above). Outputs generated by AI are such productions that overly lack the intervention of a physical person, as described under 4.2 above.<sup>37</sup>

**4.4** - In some countries, it is asserted that there can only be a work of authorship if the form obtained is the result of creative work by the author in the sense that the latter is aware of the result (work) he wants to achieve even if this result is a little different from his hope/expectations. This requirement, for example, would exclude the quality of author of a person deprived of discernment (for example, an insane person, a very young child, a somnambulist...) or would entail the refusal of protection of a production which would be only the fruit of random forces.

Does this condition exist in your country?

No.<sup>38</sup>

If so, is it a statutory or administrative requirement? Does it derive from caselaw? From secondary authorities (e.g. academic writings)?

**4.5** - Are the criteria traditionally considered to be irrelevant (such as merit, or purpose) taken into account in the framework of protecting an AI output?

De lege lata, AI output cannot be protected by copyright under the German Copyright Act. Thus, the criteria do not apply either. Traditionally irrelevant considered criteria remain irrelevant concerning the preconditions of copyright protection.<sup>39</sup>

#### ***- Characterization of a performer's performance***

**4.6** - In order to be vested with a neighboring right, does the performer necessarily have to be a natural person?

In other words, is an "interpretation" from an artificial intelligence protectable under neighbouring rights?

No, the performer necessarily has to be a natural person. It follows from the fact that only natural persons are able to make artistically valuable achievements such as interpretations and is implied by the existence of the performers' moral rights laid down in §§ 74, 75 of the German Copyright Act and the use of the term "mit dem Tode des ausübenden Künstlers" ("upon the performer's death") in § 76 of the German Copyright Act.<sup>40</sup>

**4.7** - In order to be vested with a neighbouring right, must the performer necessarily interpret a work created by a natural person?

In other words, is the interpretation, by a human being, of a production of artificial intelligence protectable under neighboring rights? (Suppose an AI-generated musical composition: if performed by a human being, would the performance be protectable?)

According to § 73 of the German Copyright Act, the performer must interpret a work or an expression of folk art ("folklore"). Whereas the interpretation of a "work" requires a work that covers the

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<sup>37</sup> For further explanation, see answer to question 4.2.

<sup>38</sup> See Wandtke/Bullinger/Bullinger, UrhG, § 2 no. 11, 14.

<sup>39</sup> See, e.g., Schricker/Loewenheim/Loewenheim/Leistner, UrhG, § 2 no. 66, 69.

<sup>40</sup> See Schricker/Loewenheim/Loewenheim/Leistner, UrhG, § 73 no. 34; see also OLG Koblenz GRUR-Int. 1968, 164 – Liebeshändel in Chioggia.

preconditions of § 2 (2) of the German Copyright Act, an expression of folk art is – in addition to its affiliation to the traditional artistic heritage developed and maintained by an individual or a definable/determinable community – characterised by the fact that it is nearly impossible to identify the (human) author. Nevertheless, it is not comparable to a production of artificial intelligence, because, after all, the creator is still required to be a natural (unidentified) person.<sup>41</sup>

**- If the AI output does not qualify for copyright protection**

**4.8** - Are the productions generated by AI, that are not covered by copyright, in the public domain?

Productions generated by AI are in the public domain, unless a related right would be applicable. Therefore, especially the rights of producers of audio recordings, producers of films and those of makers of databases have to be taken into consideration.<sup>42</sup> Nevertheless, and since the protection of these related rights requires a certain level of investment and economic achievement, in most cases, the rules will not be applicable to AI-generated output.<sup>43</sup>

**4.9** - In your country, could the productions generated by AI be qualified as "commons" (it being understood that, in some countries, the notion of "commons" has a different meaning than "public domain")? Under what conditions or according to what criteria?

In German copyright law, the term "commons" does not exist, but only the term "public domain" is used.

**4.10** - How can we be sure that the creation presented as realized by an author is not an artificial production?

Presently, you cannot be fully secure whether a creation has been created by a human or by artificial intelligence. So far, several "AI classifier" like "GPT Zero" or the website "detector.dng.ai" have been developed, which categorise a literal creation by the complexity of the text itself or by determining different variations typically used by humans only. Lastly, the use of so-called radioactive data has been considered.<sup>44</sup> Even though these programmes seem beneficial, their success is still more accidental than fully reliable.<sup>45</sup> See, however also above, re "Spawning", under 1.2 and in footnote 12.

**4.11** - Usually, a collective management organization (CMO) manages a catalog attached to an author without making distinctions between "works" / "productions". How to manage the case of an author whose usual works belong to his repertoire but who would also use an AI system to generate other "productions"?

CMOs are managing the rights of authors in their copyright protected "works" in accordance with the respective deed of assignment. Other "productions" that are not protected under copyright law would fall outside the scope of the CMO's managing activity. The question therefore is whether the output is copyright protected. As far as the output is protected, which can be the case even if an AI system has been used to assist the author in the creation process, a CMO will manage this "work" as part of the

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<sup>41</sup> See Schricker/Loewenheim/Loewenheim/Leistner, UrhG, § 73 no. 13, see also Dreier/Schulze/Dreier, UrhG, § 73 no. 8 f.

<sup>42</sup> M. v. Welser, 'ChatGPT und Urheberrecht', GRUR-Prax 2023, p. 57 ff; see also S. v. Lewinski 'L'intelligence artificielle et le droit d'auteur', Mélanges en l'honneur de Pierre Sirinelli 'Entre art et technique : les dynamiques du droit', p. 150 f.

<sup>43</sup> See M. v. Welser, 'ChatGPT und Urheberrecht', GRUR-Prax 2023, p. 57 ff; see also S. Hetmak/A. Lauber-Rönsberg, 'Künstliche Intelligenz – Herausforderungen für das Immaterialgüterrecht', GRUR 2018, p. 574 ff.

<sup>44</sup> See M. Moorstedt, 'Wer War's?', Süddeutsche Zeitung no. 24, Jan. 2023.

<sup>45</sup> See, e.g., J. Kapalski, 'OpenAI veröffentlicht Tool zur Erkennung von KI-Texten' (retrieved on 20 April 2023), <<https://www.giga.de/artikel/wie-kann-man-chatgpt-texte-erkennen/>>.

author's repertoire. By contrast, if the AI output does not qualify for copyright protection, such other "production" will not be managed by the CMO. Of course, it is likely that there will be cases where this demarcation is not clear. At least if a CMO can presume that an author is requesting registration for unprotected "productions", e.g. in the case of such a multitude of requests that a human creation seems impossible, the CMO could ask the author to confirm that he is requesting registration for copyright protected "works" and not for "productions" generated exclusively by an AI system.

## **2. The rights regime**

### **- The choice of the right (nature, ownership, regime, limitations)**

#### **\* As your legislation currently stands:**

**5.1** - Is the output generated by an artificial intelligence system likely to be protected by copyright in your country?

No.

**5.2** - If applicable, does the production generated by an artificial intelligence system benefit from a full copyright, in particular as regards the duration and scope of the rights, or from a modified or special right?

German Copyright Law does not apply to AI-generated productions.

**5.3** - If there is a protection by an adapted or special copyright (as it exists sometimes for certain works, as for example, in Europe, concerning computer programs), what are the modifications or adaptations?

There are no adapted or special copyright regulations concerning AI-generated products.

**5.4** - Who is the author? Who would be the owner of the rights? Could the output be considered a joint work? If so, between whom and in what cases?

Since there are no rights, a possible author cannot be identified.

**5.5** - Is there a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations; see for example, art. 9 (3) Copyright, Designs and Patents Act (CDPA) in England)?

No.

#### **\* In the event of a possible legislative change:**

*Are there any concrete proposals in your country related to the items listed below? If so, answer questions 5.6 and following.*

*If not :*

*i) the national rapporteurs can give their personal opinion while making it clear that these are mere proposals of secondary authorities (e.g., academics) and not positive law;*

*ii) or they can go directly to the questions numbered 6 and following.*

**5.6** - What would be the criteria to be retained to allow access to copyright protection for AI outputs?

**5.7** - Should a specific copyright be created for these productions?

**5.8** - With what particularities (e.g., duration and content of the rights) ?

**5.9** - Can there still be a moral right ?

**5.10** - Should there be a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations)?

**5.11** - Should a deposit be required? / A declaration of "origin"?

**5.12** - Should a kind of neighbouring right or a sui generis right be created?

**5.13** - What would be its characteristics?

**5.14** - The rights covered?

**5.15** - Generally speaking, what would be the limitations on or exceptions to this new right?

**5.16** - How should this protection be articulated with other existing protections?

**5.17** - In the absence of protection by a property right, are there any compromise solutions?

For example, a kind of paying public domain for them: collection of royalties paid to a collective management organization for distribution among authors continuing to create works in the traditional way? What else?

#### **- AI and violation of rights: the choice of remedy**

**6.1** - Can an AI output infringe, and to what extent? Who would be liable?

There are frequent scenarios in which an AI output can possibly infringe.

The input of an AI is likely to be protected by either § 2 (2) of the German Copyright Act or a related right. Thus, AI generated outputs can notably infringe the author's right of reproduction or adaptation. For instance, in the case of instructing the AI to translate a literary work into another language, the right of translation laid down in § 23 of the German Copyright Act may be infringed.<sup>46</sup>

Generally, it can be stated that the application of solely one specific work by the AI is likely to infringe the author's right of adaptation, if its preconditions, especially the recognizability of pre-existing elements, are fulfilled.<sup>47</sup> Therefore, the decision of the German Supreme Court on the production of a new sequence of a literary work may be mentioned.<sup>48</sup>

Another and yet more challenging question is whether it can be qualified as an infringement of this right if a certain number of different works from one author is given to the AI as an inspiration so that the output, consequently, imitates or resembles the author's style. To cover the preconditions of § 23 of the German Copyright Act, the protected parts of a work must essentially be adapted.<sup>49</sup> As for an AI

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<sup>46</sup> See *M. v. Welser*, 'ChatGPT und Urheberrecht', GRUR-Prax 2023, p. 58; see also Schricker/Loewenheim/Loewenheim, UrhG, § 23 no. 8.

<sup>47</sup> See *S. v. Lewinski* 'L'intelligence artificielle et le droit d'auteur', Mélanges en l'honneur de Pierre Sirinelli 'Entre art et technique : les dynamiques du droit', p. 147.

<sup>48</sup> BGH GRUR 1999, 984, 987 – Laras Tochter; see also *M. v. Welser*, 'ChatGPT und Urheberrecht', GRUR-Prax 2023, p. 58, concerning the infringement of the author's right of adaptation by rewriting a film scene through AI.

<sup>49</sup> Schricker/Loewenheim/Loewenheim, UrhG, § 23 no. 12.

generated output, it will be difficult to meet the above-mentioned criteria.<sup>50</sup> In the case of “adaptations” of non-protected parts, like, e.g., the individual style or the overall genre, § 23 of the German Copyright Act is not likely to apply.<sup>51</sup> There is little jurisprudence, but, nevertheless, the Regional Court of Cologne (OLG Köln) once stated that, if the utilisation of the typical style of an author has given the impression that the original author has created the (new) work, § 23 of the German Copyright Act shall apply.<sup>52</sup> Additionally, a violation of the personality right laid down in § 823 (1) of the German Civil Code may be considered, even though the enforcement of a possible claim is mostly suppressed by the speciality of copyright law.

As for the liability, it is still unclear whether the person indicating the AI generated output (operator) or the person responsible for the input is legally liable concerning infringements through the output. It seems like there is no legislation in Germany containing liability rules specifically applicable to infringements caused by an AI-output yet. However, it should be mentioned, that, *de lege lata*, accomplices of infringements are considered as liable as the perpetrator itself.<sup>53</sup> In addition, liability for interference is possible in case of contributing to an injury in any way.<sup>54</sup> Nevertheless, for legal liability, a willful/intentional action of infringement is required,<sup>55</sup> which is, at least for the person operating the AI in an uncommercial manner, mostly hard to construct. Lastly, according to § 840 of the German Civil Code, the liability of more than one person is also possible even though strict liability should only lie with the one whose control of the risks is dominating.

**6.2** - Are there other legal means (e.g. unfair competition, parasitism) to engage the liability of the person responsible for the AI output? (Who would that person be?)

Unfair competition law is another possible legal means to engage the liability of the person responsible for the AI output. Therefore, § 4 no. 3 lit. c, § 3 (1) and § 5 of the Act against Unfair Competition may be relevant. Though, due to a lack of fitting accurately and its subsidiarity to special rights like copyright, the Act against Unfair Competition is not likely to apply.<sup>56</sup>

**6.3** - Beyond copyright, can personality rights prevent the realization by an AI of a production using the voice or physical aspect of another person?

As for the protection of the human voice, in general, § 73 of the German Copyright Act must be applied primarily concerning vocal performances. However, the voice is only protected in relation to the performance and not as such. Therefore, the question of other rights for prevention arises. The human voice is protected by the personality right laid down in § 823 (1) of the German Civil Code.<sup>57</sup> To prevent the realisation of a production by an AI, the person concerned may seek injunctive relief laid down in §§ 823 (1) in conjunction with 1004 (analogous) of the German Civil Code.

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<sup>50</sup> For further discussion, see *S. v. Lewinski* ‘L’intelligence artificielle et le droit d’auteur’, *Mélanges en l’honneur de Pierre Sirinelli* ‘Entre art et technique : les dynamiques du droit’, p. 146.

<sup>51</sup> See, e.g., *Schricker/Loewenheim/Loewenheim*, *UrhG*, § 2 no. 147.

<sup>52</sup> OLG Cologne, *NJW* 1998, 1416.

<sup>53</sup> See *BeckOK UrhR/Reber UrhG*, § 97 no. 35 f. : The consideration as such is assessed according to the general principles of the criminal law.

<sup>54</sup> See *BeckOK UrhR/Reber UrhG*, § 97 no. 42 ff

<sup>55</sup> See *BeckOK UrhR/Reber UrhG*, § 97 no. 35 f.

<sup>56</sup> See *S. Bußmann et al.* ‘Die Schutzfähigkeit von KI-Trainingsdaten *de lege lata*’, *RDi* 2022, p. 395.

<sup>57</sup> See *A. Schierholz*, ‘Der Schutz der menschlichen Stimme gegen Übernahme und Nachahmung’, p. 86 ff., qualifying it as a „special“ personality right.

Furthermore, the external appearance, a physical aspect of a person, is likely to be protected by § 22 KUG if the person depicted is recognizable externally.<sup>58</sup> It must be noted, however, that the person concerned can acquiesce, by either giving consent explicitly or implicitly. Nevertheless, the scope of that consent is to be determined based on the circumstances of the actual case.<sup>59</sup>

**- Question of transparency and remuneration**

**7.1** - In your country, is there a requirement (legal, administrative, jurisprudential, arising from practice) that AI-generated content in general be declared as such (see for example in Europe, the AI Act of April 21, 2021<sup>60</sup> and the more nuanced position of the Council of the European Union of November 2022<sup>61</sup>)?

At the moment, it does not seem like there is any legislation or jurisprudence which confirms such a requirement. Nevertheless, collecting societies consider to oblige authors to communicate openly about the utilisation of an AI during the process of creation. With that being said, it can be pointed out that there is indeed a requirement of declaration about to be arising from practice.

*(Optional) If not, do you think that such a solution should be adopted?*

**7.2** - If applicable, how is the sharing and payment of remuneration carried out when AI is involved in the creative process?

De lege lata, there is no regulation concerning the carrying out of the payment and sharing of remuneration.

*(Optional) If there is no existing solution, what solution do you think should be adopted?*

*Generally, it can be stated that solely the author himself is likely to be the rightholder. Thereby, to match the overall reason of remuneration, authors who have been using AI during the creative process while adding creative elements themselves should not receive full payment.*

**7.3** - If applicable, how is the sum linked to the AI allocated (cultural action? payment to other rights holders...)

*(Optional) If there is no existing solution, what solution do you think should be adopted?*

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<sup>58</sup> See Wandtke/Bullinger/Fricke, KUG, § 22 no. 5 ff.

<sup>59</sup> For frequent examples based on the threshold and the limits of such consent, see Wandtke/Bullinger/Fricke, KUG, § 22 no. 13 ff.

<sup>60</sup> <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021PC0206>

<sup>61</sup> <https://www.consilium.europa.eu/fr/press/press-releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights/>